LOS ANGELES BAR BULLETIN

In This Issue

Vol. 34 OCTOBER 1959 No. 12

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BAR BULLETIN

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VOL. 34 OCTOBER, 1959 No. 12

Junior Barristers' Page

By RICHARD F. ALDEN

RICHARD F. ALDEN

Each year the Junior Barristers are given the opportunity to publish an issue of the Bar Bulletin. In this issue you will find the prize winning essays of our Annual Essay Contest. I would like to express our appreciation to Justice Allen W. Ashburn, whose contribution to the winner's annual award has certainly contributed to the success of the contest. We are also indebted to the judges of this year's contest, Justice Walter Fourt of the California District Court of Appeals, Commissioner Arthur K. Marshall of the Los Angeles Superior Court and Professor Harold Horowitz of the University of Southern California School of Law.

As you all know, a strong and active Junior Barristers program is important to the welfare and future of the Los Angeles Bar Association. The Senior Bar can consistently maintain its present high stature and prominence only by a continual influx of a large number of graduates from the Junior Bar who are well versed in Bar activities and who have developed through their participation in the Junior Barristers an awareness of the important role played by the Bar Association in our profession and an enthusiasm and desire to undertake the responsibilities of perpetuating the Bar Association and everything for which it stands.

Like other similar organizations, one of the main problems of the Junior Barristers is the inability to interest more than a fraction

of its total membership in active participation in many of its functions. This year the Executive Council has attempted to "broaden the base" and offer varied activities which are designed to stimulate interest among all the members rather than just a few. At the present time we are seriously considering the feasibility of establishing working committees of the Junior Barristers comparable to those which are operating so well for our senior counterparts. It is hoped that perhaps in this way more Junior Barristers will take an active part in the Association's affairs and will be more easily assimilated into the committees of the Los Angeles Bar Association.

Realistically, however, a younger lawyer's interest and activity in Bar work will depend in a large measure upon the extent of encouragement he receives from the members of the Senior Bar. After all, these are usually the employers and/or the advisors of most Junior Barristers. Therefore, in order that the Junior Barristers may attain the greatest participation possible by all the younger attorneys, I urge all lawyers and law firms to financially support and encourage their younger attorneys' active participation in the activities of the Association.

Issue Editor—James H. Knecht, Jr.

Criminal Abortion: Facing the Facts

By ZAD LEAVY*

Justice Ashburn First Prize Winner
1959 Junior Barristers' Essay Contest

"The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother." [Macnaghten, J., charging the jury in *Regina v. Bourne.*][1]

ZAD LEAVY

Referring to the problem of abortion in the United States and to the criminal law of abortion, an eminent physician wrote in 1936: "Ostrich-like we have buried our heads in the sand and refused to look facts in the face."[2] The problem of abortion is still with us, yet the law exists today substantially the same as it was in 1936.[3] Perhaps, to this day society has yet to "look facts in the face."

To better understand the abortion problem, it might first be explored from the point of view of the pregnant woman. Assume, for a moment, the following hypothetical situation: A healthy, young woman is determined not to bear the child she is carrying. Most likely she is married and has

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[1] 1 K.B. 472 (1938), 3 All E.R. 615, 108 L.J.K.B. 471, CCA. This excerpt from Mr. Justice Macnaghten's instructions is a general statement of the law of criminal abortion as it exists today throughout most of the United States and a great part of the western world, and as it has existed in the common law countries since 1803. Prior to 1803 abortion was unlawful only when induced after the fetus had "quickened," i.e., moved in the womb. Prof. Glanville Williams, THE SANCTITY OF LIFE AND THE CRIMINAL LAW, Knopf, N.Y., 1957, [hereinafter cited as SANCTITY OF LIFE], p. 149.

[2] F. J. Taussig, ABORTION, SPONTANEOUS AND INDUCED, Mosby, St. Louis, 1936, [hereinafter cited as TAUSSIG], p. 396. Dr. Taussig's book is considered the modern classic on the subject of abortion in the U.S., and no discussion of that subject would be complete without mention of his work.

[3] Cal. Pen. Code § 274 makes it a felony for any person "who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to perserve her life. . . ." [§ 274 is typical of abortion statutes found in most of the U.S., *infra* note 12.]

Miscarriage is "the expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time and before the expiration of the

already borne two or more children.[4] Her physician wants nothing to do with a criminal abortion, nor will he recommend her to an abortionist, and probably is afraid even to examine her.[5] Through friends or other contacts she locates an abortionist who is willing to terminate her pregnancy for a substantial fee. If she is fortunate enough to have sufficient funds and the proper contacts, a qualified medical practitioner may stretch the facts in her case history to the point where therapeutic abortion is justified.[6] On the other hand, she may resort to the professional abortionist, operating under unsanitary conditions and without having had adequate medical training.

This general situation is typical of hundreds of thousands occurring each year in the United States.[7] In her anxiety to rid herself of the child, little does our hypothetical woman realize what pain and suffering[8] and physical danger[9] may lie ahead.

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sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the foetus at any time before birth is termed, in law, procuring miscarriage." People v. Rankin, 10 Cal. 2d 198, 74 P.2d 71 (1937).

Abortion and miscarriage are defined as the termination of pregnancy, either induced or spontaneous, at any time before the fetus is viable (capable of life independent of the mother). Interruption of pregnancy after the onset of viability and before normal birth is considered premature delivery. *Medicolegal Analysis of Abortion Statutes,* 31 So. Calif. L. Rev. 181 (1958).

[4]Contrary to the popular notion that most criminal abortions involve illegitimate pregnancies, the majority (estimated at 90%) of such abortions are performed on married women who seek to avoid the economic burden of another child. MODEL PENAL CODE, Tent. Draft No. 9 as approved by A.L.I., § 207.11 (1959), [hereinafter cited as MODEL PENAL CODE], p. 147. Also. *The Law of Criminal Abortion: An Analysis of Proposed Reforms,* 32 Ind. L.J. 193 (1957).

[5]Dr. Timanus in Calderone, ABORTION IN THE UNITED STATES, Hoeber-Harper, N.Y., 1958, [hereinafter cited as CALDERONE], p. 6. Also, SANCTITY OF LIFE 190.

[6]Therapeutic abortion is the interruption of pregnancy before viability in order to conserve the life or health of the mother. TAUSSIG 480.

"The law of therapeutic abortion tends to be one for the rich and another for the poor." SANCTITY OF LIFE 189.

It seems to be an accepted fact among medical men that many physicians will perform an abortion for therapeutic purposes, when it does not in fact fall within the legal exception to the prohibitory statute. *Infra* note 40.

[7]MODEL PENAL CODE 147. Estimates run as high as 2,000,000 induced abortions annually, between 30% and 70% of these being illegal.

[8]Testimony of aborted women, People v. Collins, transcript of preliminary hearing held June 17, 1959, in the Municipal Court of the Los Angeles Judicial District, case #152917, at p. 46:

"Q. What did you feel at that time?"

"A. Well, there was so much pain—and I just don't—I can't explain it, really. I just know it was like my whole stomach was coming out."

Also, at p. 103:

"Q. BY MR. LEAVY: Can you describe the pain you felt?"

"A. Yes. It hurt very bad. It felt as if my insides were being torn out."

[9]An abortion induced under unsanitary conditions by one not a qualified physician may result in hemorrhaging, infection, chronic illness, permanent invalidism, sterility, nervous condition (sometimes leading to frigidity), or death. Gebhard, PREGNANCY, BIRTH AND ABORTION, Harper, N.Y., 1958, pp. 190, 203, 204. Also, Gradwohl, LEGAL MEDICINE, Mosby, St. Louis, 1954, p. 814.

See Rosen, THERAPEUTIC ABORTION, MEDICAL, PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS, Julian Press, N.Y., 1954, for a comprehensive study of methods used to induce abortion illegally.

[Various objects used to induce abortion by insertion into the vaginal vault (of some women who were not even pregnant) are noted in *Foreign Bodies Lost in the*

Furthermore, it is estimated that attempted criminal abortions in this country result in the death of between five and ten thousand women annually.[10] A situation involving such an unnecessary and wasteful expenditure of human life and health is indeed a problem deserving of our attention, and of efforts directed toward correcing this horrendous social disease.

How does our society deal with this problem of abortion? The legislature has declared the procurement of an abortion to be a felony,[11] and the California statute is typical of those found in most of the United States.[12] The one exception provided by statute or case law in most jurisdictions,[13] including California,[14] is the situation where termination of pregnancy is necessary to preserve the *life* of the mother, although some few states allow abortion where necessary to preserve the mother's *life or health*.[15] The words "necessary to preserve her life" do not include conditions merely detrimental to a woman's mental or physical health,[16] since states having this more narrow exception have not generally adopted the broad interpretation of *Regina v. Bourne*.[17] Thus, a woman

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Pelvis During Attempted Abortion et seq., 70 Amer. J. Obst. & Gyn. 233 (1955): Hatpins, hairpins, bobbypins, knitting needles, crochet hooks, metal syringe tips, umbrella ribs, catheters, penholders, pieces of eyeglasses, pencils, pieces of wood and bark, glass stirring rods, feathers, stalks of plants, glass cocktail stirrers, and old shoeleather! The diversity of objects used seems "limited only by their availability and by the patient's imagination as well as, perhaps, her state of desperation!" 76(3) Amer. J. Obst. & Gyn. 561 (1958).]

[10] *Medicolegal Analysis of Abortion Statutes*, 31 So. Calif. L. Rev. 181 (1958).

[11] Cal. Pen. Code § 274, *supra* note 3.

[See also Cal. Pen. Code §§ 275 & 276 dealing with women submitting to and soliciting abortion, and soliciting women to submit to abortion.]

Also, an *attempted* abortion may fall within the substantive offense of Cal. Pen. Code § 274. People v. Berger, 131 Cal. App. 2d 127, 280 P.2d 136 (1955). Proof of pregnancy is not an essential element of the People's case, nor is it necessary to prove that an abortion resulted. People v. Gallardo, 41 Cal. 2d 57, 257 P.2d 29 (1953). But the defendant must either know or belive that the woman is pregnant before he attempts the abortion. People v. Wales, 136 Cal. App. 2d 846, 289 P.2d 305 (1955). Burden is on the People to show non-necessity of abortion to save life of mother, but her testimony that she was in good health prior to the operation is sufficient. People v. Gallardo, *supra*.

[12] *Therapeutic Abortion: A Problem in Law and Medicine*, 11 Stan. L. Rev. 417, 418 (May 1959). Also, *Abortion Laws in the United States*, a comprehensive review by Prof. Fowler Harper of Yale Law School, at p. 187 of CALDERONE, *op. cit. supra* note 5.

[13] *Ibid.*

[14] Cal. Pen. Code § 274, *supra* note 3.

[15] See note 12 *supra*.

[16] Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9.

[17] 1 K.B. 472 (1938), 3 All E.R. 615, 108 L.J.K.B. 471, CCA. Dr. Alec Bourne, an eminent obstetrical surgeon, performed an operation to terminate the pregnancy of a 14 year old girl who had been impregnated as a result of forcible rape committed upon her by several soldiers. Arrest and trial were sought by Dr. Bourne in order to obtain a clarification of the law, and his contention was that the legal exception to criminal abortion ("for the purpose of preserving the life of the mother") does not only mean physical life but emotional life as well. Dr. Bourne opined that the girl would have become a mental wreck if compelled to bear the child, and contended that a woman whose health is threatened by pregnancy should not have to be in the jaws of death before abortion could be performed lawfully. The court sustained this defense, specifying, however, that it could never be available to the "professional abortionist."

See LEGAL MEDICINE, *op. cit. supra* note 9, for a discussion of how "to preserve the life of the mother" has been interpreted only infrequently in the U.S., and of the desirability of the Bourne interpretation.

determined to terminate her pregnancy while living in a jurisdiction having the narrower exception, whose pregnancy is not immediately endangering her life, is faced with the situation of our hypothetical woman above. She is abandoned by society in her greatest need, and may well fall prey to the unskilled abortionist because of the unwavering severity of the law.[18]

One cannot discuss the law of abortion without taking into account the original moral and religious objectives of protecting the unborn child, for this continues to be the main factor accounting for the law as it is today.[19] As the fetus develops to the stage where it is recognizably human in form (4 to 6 weeks), or to the point when it begins to move inside its mother ("quickening": 14 to 20 weeks), a certain compassionate sympathy attaches to it, and its subsequent destruction is regarded by many as being morally equivalent to murder, and as depriving the unborn child of its "inalienable" right to live.[20] In addition, some oppose liberalizing the law because they feel it would encourage and give free license to illicit intercourse, while others consider the mere discussion of abortion as being obscene.[21] American courts by and large seem to regard interference with propogation as a moral question involving a crime against nature.[22]

Although induced abortion has been practiced by man for thousands of years,[23] "unequivocal moral and legal antipathy to abortion originated with the Hebrews,[24] who were exhorted by God 'to be fruitful and multiply.' "[25] The so-called "Jewish view"[26]

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[18]Criminal repression of abortion most likely leads women to seek illicit termination of pregnancy by unqualified personnel under unsanitary conditions. MODEL PENAL CODE 150. Also, CALDERONE, *op. cit. supra* note 5. "The effect of the law is not to eliminate abortion but to drive it into the most undesirable channels." SANCTITY OF LIFE 212.

[19]MODEL PENAL CODE 148.

[20]MODEL PENAL CODE 148. *The Rights of the Unborn Child*, 25 Trans. Pac. Coast Obst. Gyn. Soc. 1 (1957), a presidential address delivered by Dr. B. J. Hanley, who maintained that the lives of the mother and child were separate and distinct from conception, and from that point on the child was entitled to the inalienable rights granted by the Creator and embodied in the U.S. Constitution. Dr. Hanley, in all seriousness, likened the fetus' separateness, and its dependence upon the mother, to a mature adult dependent upon an iron lung.

[21]MODEL PENAL CODE 148.

[22]*The Law of Criminal Abortion: An Anlysis of Proposed Reforms*, 32 Ind. L.J. 193 (1957).

[23]A. F. Guttmacher, *Therapeutic Abortion in a Large General Hospital*, 37 Surg. Clin. N. Amer. 459 (1957).

[24]Although there were conflicts of opinion long before the Hebrews as to whether abortion was morally right. See note 23 *supra*.

[25]See note 23 *supra*.

[26]A current, authoritative "Jewish view" on therapeutic abortion would be difficult if not impossible to ascertain, because, unlike Protestantism and Catholicism, there is no central religious authority. The Jewish People of modern times are spread throughout the world and are divided into several religious denominations. This was not the case, of course, before the Jews were dispersed from the land now known as Israel. Rabbi A. E. Cohen, *A Jewish View Toward Therapeutic Abortion*, at 166 of Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9.

underwent a gradual change, however, until the renowned Spanish Rabbi Maimonides provided, in his comprehensive code book of Jewish law in 1168 C.E., for therapeutic abortion under the heading of self-defense.[27] When a woman's life was endangered by pregnancy, according to Maimonides, the fetus might be destroyed just as an attacker could justifiably be killed in self-defense. No doubt contemporary Jewish Talmudic scholars do not consider the present law too liberal, and, by and large, probably would not strongly oppose a cautious broadening of the legal exception to the abortion statute.[28] Nor is Protestantism, for the most part, opposed to the present exception to the prohibitory law, most Protestant authority holding that abortion is not a problem for the church but should be handled by the doctor, the individual patient and her clergyman, with primary consideration being given the mother.[29] It is the Roman Catholic view which raises the most controversy.[30]

Catholicism provides that any direct attack on the fetus is murder,[31] this attitude having been taken over unmodified by Christianity from early Judaism.[32] The Catholic physician has both the mother and the child as patients, and each has an equal right to live; he must attempt to save them both, and cannot choose between saving one over the other or of killing one to save the other; neither the physician or the mother have the right to make such a choice.[33] The historical reason for Catholic opposition to induced abortion is that it brings about death of the child in original sin without the sacrament of baptism, condemning it to eternal punishment.[34] The

(Continued on page 373)

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[27]Cohen, *supra* note 26, citing MISHNA TORAH, *Laws of Murder and Self-Defense*, Ch. 1, Para. 9.

[28]Cohen, *supra* note 26. Also, *Therapeutic Abortion in the Light of the General and Jewish Law*, 55(8) HAREFUAH, J. Med. Assn. Israel, Jerusalem—Tel Aviv 192 (Oct. 1958) (In Hebrew): Authorities say that the religious law is liberal enough to allow broadening of the medical indications for lawful therapeutic abortion. It may be argued that the embryo is part of a woman's body, such as a limb, and if it causes danger to the woman's life or health it should be amputated, as with a limb.

[29]Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9, at 161.

[30]For an interesting and enlightening discussion of the Catholic viewpoint, and an effective challenge to its logic, see SANCTITY OF LIFE 193.

[31]Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9, at 161.

[32]See note 23 *supra*.

[33]See note 31 *supra*.

[34]SANCTITY OF LIFE 193. Some surgeons, to be on the safe side and alleviate the fears of the Catholic mother, introduce sterile holy water into the uterus while uttering the proper purificatory words, prior to commencing an operation that will result in the death of the fetus. SANCTITY 196.

When is an Offering "Private" Instead of "Public" Under the Securities Act of 1933?

By FRED L. LEYDORF*
Second Place Winner
1959 Junior Barristers' Essay Contest

I. Introduction

The Federal Securities Act of 1933[1] is based on the belief that if full disclosure of material facts of an issue of securities is made, and a prospectus is required to be furnished to each prospective purchaser before he takes action, the necessary protection to investors will be provided[2]. This is pointed out in the preamble to the Act which states that the statute is "An Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."[3] Before the protective provisions of the Act can be brought to bear, however, the issue must not fall within any of the exemption provisions of the Act. The exemption with which this paper is concerned is that found in Section 4(1) of the Act[4] which states that the registration provisions of the Act shall not apply to "transactions by an issuer not involving any public offering."

Mr. Louis Loss, a leading writer in the field of securities regulation, has said in regards to the exemption found in Section 4(1), "These few words ('transactions by an issuer not involving any public offering') support a substantial gloss."[5] That is at best an understatement. Other writers have said that "the determination of whether the proposed sale of securities will be a public offering, as distinguished from a private offering, is a question that cannot be categorically answered even after twenty-two years of experience under the Federal Securities Act."[6] Also, this is "perhaps the

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[1] 15 U. S. C. Sec. 77a, *et seq.*, 48 Stat. 74 (1933).
[2] Ballantine, Lattin, Jennings, *Cases and Materials on Corporations* 678 (1953).
[3] 48 Stat. 74 (1933).
[4] 15 U. S. C. Sec. 77d, 48 Stat. 77 as amended 68 Stat. 684 (1954).
[5] Loss, *Securities Regulation* (1951).
[6] Feldman and Meer, "Selling Securities to the Public," 2 *The Practical Lawyer* 15 (March 1956).

exemption most subject to varying interpretation," which is probably because the term "public offering" is not defined in the Act itself, if a definition were ever possible, which is doubtful.[7] A close look at legislative materials and the relatively few cases decided under this section, however, does give some criteria for determining when an offering is "private" under the Act. In determining this criteria the administrative interpretation of the section will first be explored, followed by the judicial interpretation given by the courts.

II. Administrative Interpretation

The legislative history of Section 4(1) does not give much assistance in determining the Congressional intent except in so far as the general tone may be set by the House Committee's reference to this exemption as permitting "an issuer to make a specific or an isolated sale of its securities to a particular person."[8] However, in 1935 the General Counsel of the Securities and Exchange Commission issued an administrative opinion[9] in which he listed the factors to be considered in determining whether a security offering is made to the public. He emphasized that the determination of what constitutes a "public offering" is essentially a question of fact in which all surrounding circumstances are to be taken into account, and repeated his prior view that an offering to twenty-five persons or less should be deemed private. Also in an early advisory opinion the Securities Division of the Federal Trade Commission ventured to say that an offering to fewer than twenty-five persons usually would not be a public offering.[10]

The General Counsel gave four principal factors or guides, the first of which was "the number of offerees and their relationship to each other and to the issuer." It must be noted that the criterion here is the number of offerees, which means offerees in the sense in which the Security Act defines the term "offer to sell" to include any "attempt . . . to dispose of . . . a security."[11] Thus if there were a large number of offerees but only one or two actual purchasers of the securities, the issue could be a "public offering." There was no exact number of offerees given which could be used to draw the line between what is a "public offering" and a "private offering."

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[7]Delaney, "Exemptions Under the Securities Act of 1933," 19 *Brooklyn Law Review* 40 (1952).
[8]H.R. Rep. No. 35, 73d Cong., 1st Sess. 15-16 (1933).
[9]Securities Act Release No. 285 (1935); 11 Fed. Reg. 10953 (1946).
[10]McCormick, *Understanding the Securities Act and S.E.C.* 101 (1948).
[11]15 U. S. C. Sec. 77b(3), 48 Stat. 75 (1933).

As to offerings to employees a House conference committee's conclusion in 1934 was that "the participants in employees' stock-investment plans may be in as great need of the protection afforded by the availability of information concerning the issuer for which they work as are most other members of the public."[12] The Federal Trade Commission also took the position that offerings to either security holders or employees were not necessarily private.[13] And also in regard to stockholders, a statement of the House Managers on the Conference Report said, "Sales of stock to stockholders become subject to the Act unless the stockholders are so small in number that the sale to them does not constitute a public offering."[14] Thus there is no doubt that an offering restricted to a particular class may cross the line if it is open to a sufficiently large number of persons.[15] The relationship between the issuer and the prospective purchasers was also a matter of importance. Thus an offering to persons of a group who should have special knowledge of the issuer was conceded less likely to be a "public offering" than an offering to members of a class of the same size who did not have this advantage.

The second factor advanced by the General Counsel was "the number of units offered." An offering of a small number of units, particularly large units, might presumably be an indication that no "public offering" would be involved, while an offering of many units in small denominations or convertible into small denominations might indicate an intention to make a distribution of the security to the public at large.

The next factor mentioned was "the size of the offering." In this connection not only the immediate transaction between the issuer and the initial offerees was to be considered, but also the likelihood of a later public offering of all or part of the securities sold. The Counsel felt that the statutory exemption was intended to apply mainly to small offerings, which in their very nature were less likely to be offered to the general public than would be large offerings.

The fourth and last factor advocated by the General Counsel was "the manner of offering." Since the purpose of the exemption of the non public offering was limited in the main to instances where the issuer desired to consummate a few transactions with particular

[12]H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).
[13]Securities Act Release No. 97, part 6 (1933).
[14]H.R. Rep. No. 152, 73d Cong., 1st Sess. 25 (1933).
[15]Loss, *Securities Regulation* (1951).

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persons, the Counsel felt that those transactions effected by direct negotiations with the issuer were more likely to be non public than those brought about through the machinery of public distribution. Also to be considered was whether the purchaser's intent was to take for resale. Thus it was the number of ultimate offerees which was controlling, for otherwise an offering to two or three underwriters would be a private offering. In another opinion the General Counsel expressed the view that retention of securities for as long as a year "would create a strong inference that they had been purchased for investment," although even then such an inference would fall "in the face of evidence of a pre-arranged scheme to effect a distribution at the end of the year."[16] The sale of unregistered securities to a limited number of initial purchasers therefore would lead to a practical situation in which such initial purchasers might have difficulty in disposing of securities purchased by them.[17]

One writer has said that "these standards are broad enough to fit nearly every case which the commission might want to prosecute, but as a result they lack any great amount of meaning."[18] This may be true, but in the light of the very small number of cases to come through the courts in this area in the last twenty-three years, it would appear that these criteria were sufficiently lucid to forestall much litigation which might otherwise have developed. On looking back it appears that at least until 1953 the number of offerees standard was the most determinative in actions taken by the Securities and Exchange Commission.[19]

At least two states have enacted provisions similar to the Commission's idea that offerings to fewer than twenty-five persons should be deemed private. They are Colorado[20] where an offer is deemed to be made "to the general public" where it is made to more than twenty-five persons in any calendar year; and Virginia[21] which exempts sales to fewer than thirty persons. Approximately eighteen states exempt the offering of stock to a corporation's incorporators, some without a limitation on the number of incorporators and others limiting the number, with limits ranging from five to twenty-five.[22]

(To be continued in the November issue)

[16] Securities Act Release No. 1862 (1938).
[17] 32 Dicta 359 (1955).
[18] 52 Michigan Law Review 298 (1953).
[19] 72 Harvard Law Review 784 (1959).
[20] Colorado Revised Statutes (1953) c. 125, Art. 1, Sec. 16(1)(d).
[21] Virginia Code (1950) Sec. 13.1-514(b)(8).
[22] 21 University of Chicago Law Review 113 (1953).

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TAX REMINDER

ELECTIONS IN DRILLING OIL AND GAS WELLS

By WIXON STEVENS*

The write-off of intangible drilling and development costs in drilling for oil and gas often attracts year-end investments, but care must be exercised to see that taxwise the desired result is achieved not only for the first well for which such expenses are incurred, but also for subsequent years involving similar investments. Where such an investment is made for the first time an election is involved. Ordinarily, an election is irrevocable after the date for filing the return.

Under I.R.C. 263(c), a taxpayer is granted the option of deducting as expense intangible drilling and development costs. This option must be evidenced in "the return for the first taxable year in which the taxpayer pays or incurs such expenditure." (Reg. 1.612-4). Once made, such election is binding upon the taxpayer for all subsequent years. If no election is made or indicated, expenses for intangible drilling and development costs must be capitalized, and such costs recovered only through depletion. Generally, the latter method results in a recovery of these items only over an extended period of time.

An exception, however, is made in the event of a dry well being drilled after the taxpayer has previously elected to capitalize costs. Here the taxpayer is permitted to deduct as expense the intangible drilling costs in the year of that well's completion rather than to follow his previous election as to productive wells (Reg. 1.612-4(d)). The application of the foregoing requirements sometimes presents problems more difficult than a mere reading of the requirements would indicate.

How the costs of future wells are to be treated, i.e., expensed or capitalized, is generally determined after the results of the first well drilled are known, if it is (a) drilled and completed in the same tax year, or (b) commenced in one year and completed during the following year before the due date for filing the return for the former.

In situation (a), sufficient time usually is afforded in which to make future plans in the event the well is productive, and, if it is nonproductive, a complete write-off of all expenses will be made. If a dry well is drilled the failure to specifically state that the

*Member, Committee on Taxation, Los Angeles Bar Association.

intangible costs are being charged to expense will not preclude the taxpayer from expensing such items as to productive wells in later years. (Hawkeye Petroleum Corp., 18 T.C. 1223).

In situation (b), the taxpayer generally will have less time than in (a) to determine whether or not to charge to expense the intangible costs incurred for the taxable years, or, if the well is nonproductive, to write off all such expenses in the second year. With the exception of the factual situation of the Hawkeye case, all foregoing elections are binding. These elections generally are made after all facts concerning the first well drilled are available, i.e., the cost, its nonproductivity, or productivity, and, if the latter, the extent thereof.

If, however, a well were to be commenced toward the end of one tax year and its completion delayed until after the due date for the return for that year, the decision as to the appropriate election in two returns must be made on incomplete facts.

Should the election ultimately made as to the first well prove unfavorable when cast in the light of succeeding wells, it may be necessary for the taxpayer to explore the possibility of either forming, or associating himself with, an entity capable of making its election as to the treatment of intangible drilling and development costs independent of the election theretofore made by the taxpayer as an individual.

CONTINUING EDUCATION OF THE BAR

Your Bar Association is again sponsoring the State Bar's continuing legal education program. The Fall 1959 lecture series is on "Probating California Estates." It will be given in the Auditorium, California Teachers Association Building, 1125 West Sixth Street, Los Angeles.

This series is offered through the facilities of University Extension. Attorneys in general practice are particularly urged to attend.

The registration fee has been increased to $20.00 to cover higher printing costs and additional staff members for the Department of Continuing Education of the Bar. Each registrant will be *mailed* (sometime in January, 1960) the new 1200-page handbook (fully indexed) on CALIFORNIA ESTATE ADMINISTRATION, which is not a rehash of the earlier probate handbook but a completely different book. It contains hundreds of annotated forms, review sheets and probate guides. A big feature is the large amount of material dealing with tax aspects of decedent's estates. *Notice:* After December 15, 1959, the price for the remaining copies will be $32.00.

Contact the University Extension, 813 So. Hill St., Los Angeles 14, for registration information.

NOTICE OF OCTOBER MEETING LOS ANGELES BAR ASSOCIATION

Wednesday, October 21, 1959
12:15 p.m.
Biltmore Hotel Ballroom

SIR LESLIE MUNRO, K.C.M.G., K.C.V.O.,

will address the meeting on the topic "The United Nations: One Hope for a Divided World." Sir Leslie is the former ambassador to the United States from New Zealand and former permanent representative of his country to the United Nations. His address should be of interest to all members of the Los Angeles Bar. Reservations must be made by Monday, October 19, 1959.

FEDERAL COURTS CRIMINAL INDIGENT DEFENSE PANEL

The Los Angeles Bar Association expresses its gratitude to the following lawyers who served on the Federal Courts Criminal Indigent Defense Panel during July and August 1959:

Judith B. Aaronson
Richards D. Barger
Frank F. Behr
Anthony C. Beilenson
Leo Bromwich
William Caplan
Richard A. Corsini
Donald W. Crocker
Sarah B. Danning
Warren G. Day
Philip Deitch
V. Edward Drake
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Robert M. Ebiner
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Harold Rostow
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Belle Silverman
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Fred A. Swide
Herman Tepp
Barbara Warner
Robert L. Wilson
Samuel Z. Winnikoff
George C. Zachary

CRIMINAL ABORTION: FACING THE FACTS

(Continued from page 360)

modern view of Rome is that a living entity comes into being at the moment of conception, and subsequent direct abortion destroys a potential human life.[35] Theologians have formulated a theory, however, the application of which in some cases might allow the same result reached by non-Catholic physicians and patients. This is called the doctrine of "double effect" or "indirect killing," and may be applied where there are both good and bad consequences resulting from a single act.[36] If the actor intends the good consequence and the evil one results as an incidence thereof, then the act is not sinful. The evil result is only "permitted," not directly intended. Examples of the application of this theory would be the surgical removal (hysterectomy) of a pregnant uterus for malignant ovarian tumor, or an operation to control hemorrhaging during pregnancy. In such cases the physician would "intend" to remove the cancer or to control the hemorrhaging, and the "indirect" death of the fetus would be incidental. (Quaere whether the pregnancy could go to full term regardless of the malignancy or the hemorrhaging, and whether such a prognosis influences the "intent" of the physician.) When the operation can in some way be justified independently of the concept of abortion there is only an "indirect killing" of the fetus, but the doctrine can never apply where danger arises to the mother simply because of pregnancy. In practice, this double effect theory is used so restrictively that cases involving Catholic hospitals, physicians and pregnant women seldom reach the same result (therapeutic abortion) as cases involving non-Catholic personnel.[37]

Although there seem to be strong moral arguments and religious dictates underlying the present abortion laws, such morality, religious dogma and legal command have never entered fully into the popular mores.[38] The law can do nothing with women who are governed by the fixed determination that their babies shall never be born and are willing to risk health and life to that end; nor is abortion morally wrongful to a woman in such a state of mind.[39] As for physicians, it is common knowledge among medical men

[35] SANCTITY OF LIFE 197.
[36] *Id.* at 193, 200.
[37] *Id.* at 204.
[38] *Id.* at 206.
[39] *Id.* at 153.

as well as legal authorities that only a small percentage of therapeutic abortions performed today are legal.[40] The advance of medicine against disease in general has made it less imperative to terminate pregnancy to save a woman's life;[41] indeed, medical indications for therapeutic abortion are becoming increasingly rare.[42] Yet most physicians recognize a professional responsibility to advise abortion, regardless of the law, for many conditions which merely menace future health,[43] protecting themselves by obtaining from colleagues concurring opinions of the necessity of therapeutic abortion.[44] Furthermore, such activities on the part of physicians and hospitals are seldom questioned by law enforcement agencies,[45] "as public opinion dictates that the authorities wink a legal eye."[46]

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[40]Some hospitals acknowledge that they permit therapeutic abortion in certain situations not recognized as legal justification under the law of the state. MODEL PENAL CODE 148. *Therapeutic Abortion: A Problem in Law and Medicine,* 11 Stan. L. Rev. 417, 419, 447 (May 1959).

"The medical profession has, as a rule, paid but little attention to what was written in the statute books, so long as public opinion, through decisions of courts and the actions of prosecuting attorneys, justified certain indications for abortion." TAUSSIG 421.

"Abortions laws do not meet today's needs and are generally violated everywhere. The more stringent the enforcement, the more deception is practiced. . . ." Timanus in CALDERONE, *op. cit. supra* note 5, at 170.

As for therapeutic abortion on psychiatric grounds, rapidly becoming the most frequent medical indication, "psychiatrists have in most cases virtually no valid grounds for recommending abortions." Lidz in CALDERONE, *op. cit. supra* note 5, at 162.

In a hospital study conducted by Dr. A. F. Guttmacher, 90% of 147 therapeutic abortions over a 5-year period did not fall strictly within the statutory exception to illegal abortion. The facts in case histories can be "stretched" to justify therapeutic abortion. The difference between illegal and therapeutic abortion was often "three hundred dollars and knowing the 'right' person." Guttmacher, *The Law That Doctors Often Break,* REDBOOK MAGAZINE, Aug. 1959, pp. 95, 96.

Even hippocrates, contrary to the Hippocratic Oath, counseled a wealthy entertainer who was burdened with an inconvenient pregnancy to leap into the air seven times with such vigor that her heels touch her buttocks: and, upon doing this the conceptus "fell onto the ground with a plop." A. F. Guttmacher, *Therapeutic Abortion in a Large General Hospital,* 37 Surg. Clin. N. Amer. 459 (1957).

[41]CALDERONE, *op. cit. supra* note 5, at 85.

[42]Russell, *Therapeutic Abortion in California in 1950,* 60 West J. Surg. 497 (1952).

[43]19 Trans. Pac. Coast Obst. Gyn. Soc. 1 (1951), presidential address by Dr. R. Fallas, who added, "[T]his is no plea for easy abortion." After advocating modernization of the abortion laws, Dr. Fallas stated, "I dare say that every person in this room under the present statutes is technically a criminal. When a law is such that a great profession is required, on humanitarian grounds, to repeatedly break this law, and when enforcement agencies recognize the laws' inadequacy by failing to prosecute flagrant infractions thereof, then it is high time something be done about it."

[44]This is common practice among physicians. SANCTITY OF LIFE 184.

[45]"Diligent research has failed to disclose a single prosecution where such procedure (getting concurring opinions) has been followed." LEGAL MEDICINE, *op. cit. supra* note 9, ch. 30. No adverse decisions where adequate consultation beforehand and approval by hospital staff committee. Russell, *Sterilization and Therapeutic Abortion,* 1(4) Clin. Obst. N.Y. 967 (1958). Hospitals of unimpeachable reputation are allowed to interpret and administer the law without supervision or interference from police, courts or medical agencies. A. F. Guttmacher, *The Law That Doctors Often Break,* REDBOOK MAGAZINE, Aug. 1959, at 96.

[46]19 Trans. Pac. Coast Obst. Gyn. Soc. 1 (1951).

"Police and other officials often allow known abortionists to practice since it is felt that there is a need for their services." PREGNANCY, BIRTH AND ABORTION, *op. cit. supra* note 9, at 192. "With the law as restrictive as it is, the illegal abortionist is virtually a social necessity. Usually he owes about half his practice to the referral from legitimate doctors." A. F. Guttmacher, *The Law That Doctors Often Break,* REDBOOK MAGAZINE, Aug. 1959, at 97.

As for professional abortionists, there exists a very low rate of prosecution and an even lower rate of conviction.[47] Women-abortees are reluctant to speak out, as they feel grateful to the person who relieved them of the unwanted burden,[48] and such cases are seldom even detected unless serious illness or death results.[49] The abortees themselves are almost never prosecuted as their testimony is needed to convict the professionals; and, what jury would convict a woman for this "crime," under a law designed in part to protect the woman herself from injury at the hands of an unskilled abortionist?[50] It seems clear that morals, religion and the criminal law offer little restraint when it comes to abortion, leading the eminent Dr. Taussig to state that he knew "of no other instance in history in which there has been such frank and universal disregard for a criminal law."[51]

Recognizing the widespread disregard for the law, and the apparent inadequacy of the law with respect to the public need, medical and legal authorities have recently blossomed forth with proposals designed to reform the law and alleviate the abortion problem.[52] [This paper will not discuss attempts made in foreign countries to deal with abortion, but interested readers are directed to numerous current studies published in the United States.][53] Modification of the present unenforceable laws is a fundamental requirement of reform, as criminal abortion may actually be stimulated by the presence of stringent laws that are loosely enforced.[54] To maintain on the books statutes which do not receive public sanction and observance is of questionable service to society. Moreover, the weight of public opinion probably favors relaxation of the present abortion laws.[55] This is not to say, however, that liberalizing the law will entirely eliminate illegal abortion, for no legis-

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[47]SANCTITY OF LIFE 206-211. *The Law of Criminal Abortion: An Analysis of Proposed Reforms*, 32 Ind. L.J. 193 (1957). TAUSSIG 438. Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9, at 181: "Juries as a whole are unwilling to convict."

[48]SANCTITY OF LIFE 206-211. *The Law of Criminal Abortion, supra* note 47.

[49]*Ibid.*

[50]SANCTITY OF LIFE 153. Also, *The Law of Criminal Abortion, supra* note 47. See note 57 *infra*.

[51]TAUSSIG 421.

[52]Such advocates of reform are too numerous to mention here, and include almost every writer cited in this paper.

[53]Some of which are: PREGNANCY, BIRTH AND ABORTION, *op. cit. supra* note 9, appendix (Russia, Japan, Sweden, Denmark, Iceland, Finland, Norway, England, Germany, France, Latin America); CALDERONE, *op. cit. supra* note 5, at 17 (Norway, Denmark, Sweden); Aren, *On Legal Abortion in Sweden et seq.*, 37 (Supp. 1) Acta Obst. Gyn. Scand. 5 (1958), advocating a more restrictive law in Sweden after experience with an extremely liberal abortion law. SANCTITY OF LIFE 236, discussing "The Experience of Limited Legalization."

[54]TAUSSIG 403.

[55]MODEL PENAL CODE 149.

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lative decree will ever prevent unwanted pregnancies, and some of these unwanted children, no doubt, will be in women who cannot qualify for lawful abortion yet are determined to abort. On the other hand, tighter restrictions on termination of pregnancy will only serve to drive illegal abortion deeper underground.[56] Furthermore, it is submitted that although the original objective of the law was to protect the unborn child in the womb, modern interpretation gives just as much if not more consideration to the health and safety of the mother.[57] Certainly, then, society is not protecting the mother's welfare by maintaining stringent laws which drive her to illegal abortion. Is there not a lesson to be learned from the days of Prohibition, when the indirect evils of the law far exceeded the evil at which the law was directed?

As for the moral and religious arguments directed at protecting the unborn child, it is submitted that legal therapeutic abortion should be modernized and separated from emotional, moralistic and religious concepts,[58] for clarity of statutory structure and application cannot be fully realized so long as insoluble conflicts exist between moral and religious dictates on one hand and public need on the other.[59] There appears to be wide disagreement among honest and responsible people as to moral standards with respect to abortion, from deep religious conviction on one hand to purely scientific and utilitarian views on the other,[60] with a substantial middle group of medical judgment[61] and public opinion[62] favoring cautious relaxation of the present laws. Use of the criminal law against a substantial body of decent opinion, whether or not a minority, seems contrary to our basic principles, as criminal punishment has traditionally been reserved for behavior falling far below the universally accepted standards of conduct. Moral de-

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[56]*The Law of Criminal Abortion: An Analysis of Proposed Reforms*, 32 Ind. L.J. 193 (1957).

[57]This is indicated not only by the fact that the law allows her to go free in favor of prosecuting the unskilled abortionist (see note 50 *supra* and Cal. Code §§ 1324, 1325 allowing immunity from prosecution where testimony is needed), but also by the fact that neither pregnancy or a completed abortion is a necessary element of the corpus delicti (see note 11 *supra*).

[58]See Guttmacher, *The Law That Doctors Often Break*, REDBOOK MAGAZINE, Aug. 1959, at 98.

[59]Dr. D. H. Mills, Deputy Medical Examiner, Los Angeles County in *Medicolegal Analysis of Abortion Statutes*, 31 So. Calif. L. Rev. 181 (1958), citing TAUSSIG 278. Dr. Mills further answers those who maintain that more liberal therapeutic abortion would tend to promote promiscuity and degradation of public morals, by urging that such pessimistic speculation and conjecture should not be allowed to stand in the way of much-needed reform.

[60]MODEL PENAL CODE 150, 151.

[61]Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 Stan. L. Rev. 417, 447 (1959).

[62]MODEL PENAL CODE 149.

mands on human behavior, over which there is wide difference of opinion, can be higher than those of the generally accepted criminal law, because violations of those higher standards do not carry the grave consequences of penal offenses.[63] Thus, the criminal law cannot undertake to draw the line where religion or morals would draw it.

Qualified physicians, particularly obstetricians and gynecologists, cannot operate honestly within the framework of current abortion laws, yet over their heads hangs the threat of prosecution pursuant to these laws, when in reality the community has no intention of punishing medical practitioners acting in good faith. The present statutory standard does not adequately answer the questions of the physician who decides that induced abortion is necessary for his patient,[64] hence, medical men often are uncertain and doubtful about the results of their actions in terminating pregnancy.[65] It is submitted that the law ought to be brought into closer conformity with public need and the practices of reputable members of the medical profession; and, that the statute should clearly set out

[63]MODEL PENAL CODE 150, 151.
[64]Packer & Gampell, *supra* note 61, at 419. Also, LEGAL MEDICINE, *op. cit. supra* note 9, ch. 30.
[65]SANCTITY OF LIFE 189.

what constitutes lawful therapeutic abortion, in order that physicians and surgeons have a clear guidepost on which to base sound medical judgment.

As suggested by numerous medical and legal authorities in recent years, it is recommended by this writer that the legal exception to the prohibitory abortion law be cautiously expanded to include (1) medical indications that termination of pregnancy is necessary to preserve either the life or health (mental or physical) of the mother, and (2) induced abortion on eugenic grounds. The distinction now made by the law between saving the mother's life and preserving her health seems both tenuous and artificial. Not only is it often difficult to determine when a condition is perilous to life as opposed to health, but it is equally if not more difficult to explain why one should be morally acceptable while the other is not. As for eugenic indications for abortion, these presently constitute the grounds for about one-third of all therapeutic abortions,[66] and include cases where the mother contracts rubella (German measles) during the first twelve weeks of pregnancy,[67] where the fetus has been exposed to X-rays,[68] or where the child is likely to be born with a hereditary disease (e.g., idiocy, insanity, epilepsy, severe nervous diseases, eye diseases leading to blindness).[69] Where parents are likely to produce a child with a grave congenital defect, it hardly seems fair for the criminal law to preclude them from erasing the slate and starting over again without this obstacle; hardship in human terms should be the test here. It is to be noted, incidentally, that the risk of injurious after-effects is almost negligible where therapeutic abortion is performed by expert hands in hospitals,[70] hence, the law should require those minimum standards of performance.[71] The reader is referred to the *Model Penal*

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[66]A. F. Guttmacher in *Therapeutic Abortion in a Large General Hospital*, 37 Surg. Clin. N. Amer. 459 (1957), and in *The Law That Doctors Often Break*, REDBOOK MAGAZINE, Aug. 1959, at 96.

[67]A. F. Guttmacher in Rosen, THERAPEUTIC ABORTION, *op. cit. supra* note 9; and MODEL PENAL CODE 154; both sources stating that rubella during the first 12 weeks of pregnancy indicates a 30% chance of a serious congenital defect or abnormality in the child.

[68]Fetus exposed to X-rays during treatment of the mother: "2/3 of the offspring may be expected to have gravely defective central nervous systems." MODEL PENAL CODE 154.

[69]TAUSSIG 318.

[70]A. F. Guttmacher in Rosen, THERAPEUTIC ABORTION 12, and in LEGAL MEDICINE 814, *op. cit. supra* note 9. SANCTITY OF LIFE 213.

There is, however, a definite possibility of post-abortion psychiatric sequelae (e.g., guilt feelings), but this must be balanced against the risk of mental or emotional disturbance from the birth of an unwanted child. SANCTITY 218.

[71]Dr. D. H. Mills, *supra* note 59.

Code for an excellent example of a broadened exception to the abortion statute.[72]

It is further suggested by this writer that the legislature set up a mechanism to police therapeutic abortion activities of physicians, namely, a committee system in hospitals. The usual method of rounding up two or three concurring physicians offers little control, because if one consultant disagrees another can usually be found who will agree.[73] Professor Packer and Mr. Gampbell, of Stanford Law School, have recently advocated an amendment to the California Health and Safety Code allowing licensed hospitals to become qualified to permit therapeutic abortion by licensed medical practitioners.[74] To so qualify, a hospital would be required to maintain a regularly-meeting therapeutic abortion committee composed of at least two obstetricians, one internist, one psychiatrist and a fifth person; and, only when a majority of the committee believed termination of pregnancy to be "medically advisable" would therapeutic abortion be justified.[75] Placing the decision for therapeutic abortion with hospital committees would not only police such activities, but in addition, would transfer the burden of refusing an abortion from the physician to the committee, thereby relieving the physician from the pressures and importunities of his patients.[76] This writer does not go as far as Packer and Gampbell,

[72]At 144. "A licensed physician is justified in terminating a pregnancy if: (a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with a grave physical or mental defect. . . ."
[(b) goes on to require two concurring medical opinions, performance in a hospital, and the keeping of proper records.]
[73]Russell, *Therapeutic Abortion in California in 1950*, 60 West J. Surg. 497 (1952).
[74]*Therapeutic Abortion: A Problem in Law and Medicine*, 11 Stan. L. Rev. 417 (May 1959).
[75]*Id.* at 452.
[76]*Id.* at 429.

who would "take this problem entirely out of the realm of criminal sanction and entrust its resolution to . . . the medical profession,"[77] but instead would advocate that their suggested committee system operate supplemental to and under the guidance of a broadened exception[78] to the penal statute prohibiting abortion.

In addition to advocating broader medical indications and eugenic grounds for legal abortion, and a hospital committee system to make the decisions as to when cases fall within statutory exceptions, this writer further recommends allowing abortion in certain situations for humanitarian reasons, e.g., where pregnancy results from forcible rape, incest, or moral irresponsibility of the female. It seems doubtful that there would be any strong moral opposition to aborting a fetus conceived by forcible rape;[79] indeed, it is evident from the dearth of reported American prosecutions that abortion in such cases is not considered a secular anti-social act.[80] As for incest, this is usually committed upon adolescent girls, and the case for abortion here seems as strong if not stronger than the case for abortion on other grounds, as there is some basis for believing that close in-breeding creates some chance of producing defective offspring, and also, there is no possibility that the offspring can be legitimatized by marriage of the parents.[81] "Morally irresponsible" girls or women are those who lack sufficient physical or mental control over their conduct, and perhaps, should include adolescents under a certain age.[82] For a man to engage in sexual intercourse with such a person is a felony on his part,[83] and it is submitted that the law should take one short step further and allow the pregnancy resulting from this "statutory rape" to be terminated.

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[77] *Id.* at 451.

[78] E.g., the stautory exception suggested in MODEL PENAL CODE, *supra* note 72.

[79] "By what possible law of humanity should an innocent young woman be compelled to endure the disgrace of giving birth to a child conceived by rape? Could it possibly be held that the crime of abortion be greater than the blighting of her young life through failure of abortion?" Dr. Fallas' presidential address in 19 Trans. Pac. Coast Obst. Gyn. Soc. 1 (1951).

[80] MODEL PENAL CODE 154. See also Regina v. Bourne, *supra* note 17.

[81] MODEL PENAL CODE 155.

[82] TAUSSIG 443 defines moral irresponsibility of the mother as meaning "that at the time of conception the woman lacked the necessary physical or mental control over her conduct, as when a pregnancy occurs as the result of physical violence (rape), or as the result of sexual relations in women of low mental development, or in girls of immature age, under sixteen years."

[83] Cal. Pen. Code § 261.

Furthermore, assuming there is no medical or eugenic indication for therapeutic abortion of a pregnancy caused by rape, incest or moral irresponsibility, it is submitted that the decision as to whether the situation falls within the statutory exception should not rest with a hospital committee or any other medical authority, but with legal authority instead. Such a decision must necessarily be based upon a finding of fact as to the bona fides of the mother's claim of forcible rape, statutory rape or incest, and properly rests with a juridical trier of fact rather than in the confines of sound medical judgment. A preliminary hearing magistrate, for instance, upon holding a defendant to answer on a rape or incest complaint,[84] or

[84]See Cal. Pen. Code §§ 860 *et seq.* for the procedures involved in felony preliminary hearings. Cal. Pen. Code § 872 requires the preliminary magistrate to order the defendant held to answer to the offense charged if "it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof. . . ."

even in a separate ex parte civil proceeding (if defendant cannot be found), might be empowered by the legislature to issue an equity decree permitting abortion of the pregnant victim.

Another important contribution the legislature could make toward alleviating the abortion problem is to provide for seeking out pregnant mothers, such as the hypothetical woman at the beginning of this paper, before they become determined to have an abortion. Literature should be disseminated to them through physicians, hospitals, social workers, charities, medical associations, and state and local health agencies, informing these pregnant women of the dangers and disadvantages of illegal abortion, the procedure for obtaining lawful therapeutic abortion, and the possibility of other courses of action more constructive than terminating pregnancy. In addition, trained and informed personnel might be made available to these women for consultation and guidance, to help them realize that abortion, legal or illegal, may not be the best or only solution for the medical, social or economic problems that seem so overwhelming at the moment, and, perhaps, that childbirth may be more gratifying than they had ever anticipated.[85]

In conclusion, this writer submits that it is one thing for medical and legal authorities to advocate reform, but quite another to move the legislature to action. It can be easily understood that few politicians would consider a forthright stand for a modern abortion law as much of a vote-getter; indeed, it would probably stir up considerable adverse comment from a few religious groups and moralists. The other alternative is to secure the aid of a substantial body of informed voters, willing to take a stand on what will probably always be a controversial question. Not until influential and authoritative groups, such as medical and bar associations, peace officer organizations and associations of district attorneys, join in a demand for a more realistic approach to abortion, will the lawmakers begin to "face the facts" and cease to regard the evils of the abortion problem with indifference.

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[85]CALDERONE, *op. cit. supra* note 5, at 182, suggests that "Consultation centers for women seeking abortion, modeled after Scandinavian centers now in existence, should be established."

STATEMENT REQUIRED BY THE ACT OF AUGUST 24, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233) SHOWING THE OWNERSHIP, MANAGEMENT, AND CIRCULATION OF

LOS ANGELES BAR BULLETIN, published monthly at Los Angeles, California, for October, 1959.

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Editor—Frank E. Loy, 433 S. Spring St., Los Angeles 13, Calif.

Managing Editor—None.

Business Manager—Robert M. Parker, Jr., 241 E. Fourth St., Los Angeles 13, Calif.

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ROBERT M. PARKER, JR.
Business Manager.

Sworn to and subscribed before me this 28th day of September, 1959.

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